Penang Development Corporation v Teoh Eng Huat & Anor

HIGH COURT (PENANG) — CIVIL APPEAL NO 12-31-86
EDGAR JOSEPH JR J
15 JANUARY 1992

Agency *— Authority of agent — Principal a statutory body — Agreement entered into by officer of statutory body on its behalf — Agreement drafted by officer and approved by a committee of the statutory body — Whether agreement binding on statutory body*

Contract *— Damages — Public policy — Statutory body engaged in housing development — Government policy requiring engagement of bumiputra contractor to undertake construction of dwelling house — Government policy not allowing summary termination of contractor's engagement for breach of engagement — Contractor delaying completion of construction — Claim for damages by purchaser of dwelling house — Whether public policy a defence*

Public Authorities *— Statutory body — Statutory body entering into agreement for construction and sale of dwelling house — Whether agreement ultra vires powers and duties of statutory body — Penang Development Corporation Enactment 1971 ss 3 & 14*

The appellants were a statutory body set up pursuant to the Penang Development Corporation Enactment 1971 ('the Enactment'). The respondents had obtained judgment against the appellants in the sessions court for damages for breach of contract by the appellants arising from the late delivery of possession of a dwelling house to the respondents who had agreed to purchase it from the appellants. The appellants appealed against the decision of the sessions court to the High Court.

By cl 11 of the agreement between the parties, construction of the dwelling house had to be completed and vacant possession thereof was to be given to the respondents within 18 calendar months from the date of execution thereof. By cl 25(b) of the agreement, it was provided that in the event of non-compliance by the appellants with the requirements of cl 11, the appellants would indemnify the respondents by the payment of interest on the purchase price calculated from the due date until the date of delivery of vacant possession.

At the trial, it was contended for the appellants that cl 11, and consequently, cl 25(b), were ultra vires the Enactment and that they had been included in the agreement without the authority of the appellants and so were not binding on the appellants. The contractor employed by the appellants to construct the dwelling house was, by government policy, a bumiputra contractor, and by the same policy, could not have its services terminated summarily, and therefore it was contended that the contractor's delay in completing construction of the dwelling house constituted circumstances 'beyond the control' of the appellants within the meaning of the proviso to cl 11 so as to exempt the appellants from liability. It was contended alternatively

that the inclusion of cl 25(b) was unauthorized and so was not binding upon the appellants. The agreement had been drafted by the appellants' director of administration, and the draft agreement had been approved by the appellants' housing committee. The agreement was signed by the director of administration on behalf of the appellants. There was evidence, inter alia, that there were available other bumiputra contractors who were able to undertake the task of constructing the dwelling house and that the appellants had not enforced their right to impose on the appointed contractor the agreed penalty for the delay.

Held, dismissing the appeal:

(1) Under the Enactment, the appellants had the power to enter into contracts such as the agreement in the instant case. Clauses 11 and 25(b), being usual terms encountered in building contracts of the kind under consideration were terms incidental to the obligation of the appellants under the agreement to construct and sell the dwelling house, an activity in which the appellants were not only empowered by but were under a duty imposed by the Enactment.

(2) There was evidence to support the finding that the housing committee was a duly authorized delegate of the appellants in all matters relating to housing and so was empowered to bind the appellants in such matters. The director of administration having obtained the prior approval of the housing committee to the contents of the agreement, he had express authority to enter into the agreement on behalf of the appellants. In any event, upon the facts, he had ostensible authority to do so.

(3) The fact that the appellants were unaware that the Housing Developers (Control and Licensing) Act 1966 did not apply to it did not make the agreement not binding upon it. In all respects, the agreement was precisely the contract the parties had intended to make and so it was binding upon the appellants in every respect.

(4) Even accepting the existence of public policy, the delay in the delivery of vacant possession of the dwelling house was not caused as a result of public policy but rather by a travesty of public policy and, as such, was caused by circumstances well within the control of the appellants.

[Bahasa Malaysia summary

Perayu ialah satu badan berkanun yang ditubuhkan menurut Enakmen Perbadanan Pembangunan Penang 1971 ('Enakmen itu'). Responden telah mendapat satu penghakiman terhadap perayu di mahkamah sesyen untuk ganti rugi kerana kemungkiran kontrak oleh perayu yang timbul daripada hantar-serah milikan yang lewat sesuatu rumah tempat tinggal kepada responden yang telah bersetuju membelinya daripada perayu. Perayu memohon terhadap keputusan mahkamah sesyen itu kepada Mahkamah Tinggi.

Mengikut fasal 11 perjanjian di antara kedua pihak itu, pembinaan rumah tempat tinggal itu harus diselesaikan dan milikan kosongnya patut diberi kepada responden dalam masa 18 bulan kalendar daripada tarikh penyempurnaan perjanjian itu. Mengikut fasal 25(b) perjanjian itu, telah diperuntukkan bahawa sekiranya perayu tidak mematuhi keperluan fasal 11, perayu akan menanggung rugi responden dengan pembayaran bunga atas harga pembelian dikira daripada tarikh yang ditetapkan (untuk penyerahan milikan kosong) hingga tarikh hantar-serah milikan kosong.

Di perbicaraan itu, telah dihujahkan bagi pihak perayu bahawa fasal 11, dan kerananya, fasal 25(b), adalah ultra vires Enakmen itu dan bahawa mereka telah dimasukkan dalam perjanjian itu tanpa dibenarkan oleh perayu dan oleh itu tidak mengikat perayu. Kontraktor yang diambil oleh perayu untuk membina rumah tempat tinggal itu adalah, mengikut polisi kerajaan, suatu kontraktor bumiputra, dan mengikut polisi yang sama, tidak boleh ditamatkan perkhidmatannya secara terus, dan oleh kerana itu telah dihujah bahawa kelengahan kontraktor itu dalam menyelesaikan pembinaan rumah tempat tinggal itu menjadi keadaan di luar kawalan ('beyond the control') perayu mengikut had maksud proviso kepada fasal 11, dan ini mengecualikan perayu daripada liabiliti. Telah dihujahkan secara alternatif bahawa kemasukkan fasal 25(b) tidak dibenarkan dan kerana itu tidak mengikat perayu. Perjanjian itu telah digubal oleh pengarah pentadbiran perayu, dan draf perjanjian itu telah diluluskan oleh jawatankuasa perumahan perayu. Perjanjian itu telah ditandatangani oleh pengarah pentadbiran bagi pihak perayu. Terdapat keterangan, antara lain, bahawa kontraktor bumiputra yang lain boleh didapati yang berkebolehan mengambil tugas membina rumah tempat tinggal itu dan perayu tidak menguat-kuasakan haknya untuk mengenakan atas kontraktor yang dilantiknya penalti yang disetujui kerana kelengahan itu.

Diputuskan, menolak rayuan itu:

(1) Di bawah Enakmen itu, perayu berkuasa untuk mengikat kontrak seperti perjanjian dalam kes ini. Fasal 11 dan 25(b), yang merupakan terma biasa yang dijumpai dalam kontrak pembinaan semacam yang sedang dipertimbangkan adalah terma bersampingan dengan obligasi perayu di bawah perjanjian membina dan menjual rumah tempat tinggal itu, suatu kegiatan dalam mana perayu bukan hanya diberi kuasa akan tetapi diletakkan di bawah kewajipan yang dikenakan oleh Enakmen itu.

(2) Terdapat keterangan menyokong pendapat bahawa jawatankuasa perumahan itu ialah wakil perayu yang diberikuasa dengan cara berpatutan dalam segala perkara berhubung dengan perumahan dan kerana itu berkuasa mengikat perayu dalam perkara itu. Pengarah pentadbiran telah memperolehi kelulusan lebih dahulu dari jawatankuasa perumahan akan isi perjanjian itu, dan oleh kerana itu dia mempunyai kuasa nyata (express authority) untuk mengikat perjanjian itu bagi pihak perayu. Apa jua terjadi, pada

fakta begitu, dia mempunyai kuasa zahir (ostensible authority) untuk berbuat begitu. A

(3) Fakta yang perayu tidak sedar bahawa Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 tidak terpakai kepadanya tidak membuat perjanjian itu tidak mengikatnya. Dari semua segi, perjanjian itu adalah dengan tepatnya kontrak yang ingin dilaksanakan oleh kedua pihak dan kerana itu ia mengikat perayu dari tiap-tiap segi. B

(4) Biarpun kewujudan polisi awam diterima, kelengahan hantarserah milikan kosong rumah tempat tinggal itu tidak disebabkan oleh polisi awam tetapi lebih tepat lagi oleh satu ejekan polisi awam dan, kerana itu, telah disebabkan oleh keadaan yang tentu di dalam kawalan perayu.] C

Cases referred to

1 *Baroness Wenlock & Ors v River Dee Co* (1885) 10 App Cas 354 (folld)
2 *Attorney General v Great Eastern Railway Co* (1880) 5 App Cas 473 (folld) D
3 *Ashbury Railway Carriage & Iron Co Ltd v Riche* (1875) LR 7 HL 653; [1874–80] All ER 2219 (refd)
4 *London County Council v Attorney General* [1902] AC 165 (refd)
5 *A-G v Crayford Urban District Council* [1962] Ch 246; [1961] 3 All ER 1002; [1961] 3 WLR 1198 (refd) E
6 *Bell Houses Ltd v City Wall Properties Ltd* [1966] 2 QB 656 (refd)
7 *A-G v Smethwick Corp* [1932] 1 Ch 562 (refd)
8 *Grainger v Liverpool Corp* [1954] 1 QB 351; [1954] 2 WLR 275; [1954] 1 All ER 333 (refd)
9 *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87 (refd) F
10 *Clarkson & Anor v Davies & Ors* [1923] AC 100 (refd)
11 *Royal British Bank v Turquand* (1856) 6 E & B 327; [1843–60] All ER 435 (refd)
12 *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 1 All ER 630; [1964] 2 QB 480; [1964] 2 WLR 618 (refd) G
13 *Richardson v Mellish* 2 Bing 229; 130 ER 294 (refd)
14 *Driefontein Consolidated Gold Mines Ltd v Janson* (1901) 17 TLR 604; [1901] 2 KB 419 (refd)

Legislation referred to H

Housing Developers (Control and Licensing) Act 1966 s 2(1)(b)
Penang Development Corporation Enactment 1971 ss 2(1)(b), 3, 10(4), 14(a), 19, 20(c), (j), 21A(3)

Lim Kean Chye (*Lim Kean Chye & Co*) for the appellants. I

Louis Edward Van Buerle (*Cheong Wai Meng & Van Buerle*) for the respondents.

Edgar Joseph Jr J: In the sessions court at Georgetown the respondents/purchasers had sued the appellants/vendors, a statutory body set up by the

Penang State Government pursuant to the Penang Development Corporation Enactment 1971 ('the Enactment'), for the recovery of liquidated damages for breach of contract for late delivery of a dwelling house with interest thereon and costs.. It will be more convenient if I refer to the appellants and the respondents as the defendants and the plaintiffs respectively.

More particularly, by a sale and purchase agreement in writing dated 12 December 1979 ('the agreement') entered into by the plaintiffs as purchasers and the defendants as vendors, the plaintiffs had agreed to purchase from the defendants, a dwelling house known as 14 Lorong Mahsuri 10, Bandar Bayan Baru, Penang ('the dwelling house') at a price of $82,364.

The agreement, by cl 11, provided that the dwelling house would have to be completed and vacant possession thereof given to the plaintiffs within 18 calendar months from the date of execution thereof.

By cl 25(b), it was provided that in the event of non-compliance by the defendants with the requirements of cl 11, the defendants would indemnify the plaintiffs by the payment of interest on the purchase price at the rate of 11%pa calculated from day to day commencing immediately from the due date until the date of delivery of vacant possession of the dwelling house.

It was common ground that although according to the terms of the agreement the defendants ought to have completed the dwelling house and delivered vacant possession thereof to the plaintiffs not later than 11 June 1981, the defendants did not do so until 12 August 1982 despite punctual payment in full of the purchase price by the plaintiffs. There was thus a delay of 427 days in respect of which the plaintiffs claimed liquidated damages amounting to $10,599 and interest thereon at the rate of 11%pa from 12 June 1981 until the date of realization.

In the court below, the defence had been amended, reamended and further reamended. In the event, the argument there revolved around the following issues:

(1) whether cl 11 was ultra vires the Enactment;
(2) if nay, whether cl 11 had been included in the agreement without the authority of the defendants and so was not binding on it;
(3) whether cl 11 was inserted by mistake and in ignorance of s 2(1)(b) of the Housing Developers (Control and Licensing) Act 1966 ('the Act') and, if so, whether it was binding on the defendants;
(4) in any event, if the agreement was found to be binding on the defendants, whether the delay in the delivery of vacant possession of the dwelling house which had been caused by the contractor, who by government policy was a bumiputra company, and who by the same policy, could not have had its services terminated summarily, constituted circumstances 'beyond the control' of the defendants within the meaning of the proviso to cl 11 so as to exempt the defendants from liability.

The learned President found each of these defences to be unsustainable and gave judgment for the plaintiffs as prayed for in the statement of claim and from the judgment the defendants have now appealed to this court.

Before me, it was contended by counsel for the defendants that the learned President's interpretation of the relevant legislative provisions relat-

ing to authorized expenditure was incorrect and that, had it been correct, she ought to have found that cl 11, and consequently cl 25(b), were ultra vires the powers of the defendants. In particular, it was contended that cl 25(b) which provided for the payment of interest by way of indemnity for late delivery, was neither authorized nor sanctioned by the provisions of the Enactment.

Alternatively, it was contended that if contrary to the defendants' primary submission, the defendants had the power by statute, to pay such interest, upon the facts, the inclusion of cl 25(b) for the payment of interest for late delivery, was unauthorized and so was not binding upon the defendants.

In particular, it was contended that, if contrary to the defendants' submission, the deputy general manager of the defendants, Encik Mokhtar bin Hashim, or the housing committee set up by the defendants had implied authority to include cl 25(b), such inclusion amounted to contracting out of the protective provisions of the Act and so was void.

In any event, it was contended that the delay in delivery of the dwelling house, having been caused by the contractor, who by government policy was a bumiputra company and who by the same policy could not have had its services terminated summarily, constituted circumstances 'beyond the control' of the defendants within the meaning of the proviso to cl 11 of the agreement so as to exempt the defendants from liability.

I now embark upon a consideration of each of these submissions.

Was cl 25(b) ultra vires the provisions of the Enactment?

I recognize that statutory corporations are subject to the doctrine of ultra vires. They are mere creatures of the statutes creating them, and the law will not suppose that they were created for any purpose other than those which induced the legislature to act (see Hart's *Introduction to the Law of Local Government and Administration* (8th Ed) at pp 292–293).

The doctrine of ultra vires as applied to statutory corporations has been well put by Lord Watson in *Baroness Wenlock & Ors v River Dee Co*[1] thuswise at p 362:

> Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.

Unlike a natural person who can in general do whatever he pleases so long as what he does is not forbidden by law or contrary to law, a statutory corporation can do only those things which it is authorized to do by statute, directly or by implication. If such a corporation acts otherwise than in this way its acts are ultra vires. There must in all cases be statutory authority for what is done, and that authority must either by expressly given or reasonably inferred from the language of an Act of Parliament.

A The doctrine, if strictly applied to statutory corporations, would greatly impede their activities and would require empowering legislation to be burdened to an impossible extent by detailed provisions. The courts have therefore held that a corporation may do not only those things for which there is expressed or implied authority, but also whatever is reasonably incidental to the doing of those things. As Lord Selbourne said in *Attorney* B *General v Great Eastern Railway Co*[2] at p 478:

> It appears to me to be important that the doctrine of ultra vires ... should be maintained. But I agree ... that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has C authorized ought not (unless expressly prohibited) to be held by judicial construction, to be ultra vires.

However, this extension, to include powers fairly incidental to those expressly conferred, does not indirectly enable statutory corporations to evade the doctrine of ultra vires. When the question arises whether a power is D fairly incidental to those expressly given by the incorporating statute, though it must be determined reasonably, the courts will not strain the language of the statute to enable the corporation to engage in activities never contemplated by the legislature. Thus if a company is incorporated by statute to manufacture railway vehicles, it cannot engage in the construction of railway systems (see *Ashbury Railway Carriage & Iron Co Ltd v Riche*[3]).

E In *London County Council v Attorney General,*[4] Lord Halsbury LC referred to *Ashbury Railway Carriage Co v Riche*[3] and *Attorney General v Great Eastern Railway*[2] and said: 'I think now it cannot be doubted that those two cases do constitute the law upon the subject.'

On the other hand, the tendency of the modern cases is to show that the F courts are more liberal in their interpretation of what is fairly incidental than was formerly the case (see *A-G v Crayford Urban District Council*[5] and *Bell Houses Ltd v City Wall Properties Ltd*[6]). Thus it has been held that the setting up of a department to undertake the provision of all the printing and stationery required by a borough council is fairly incidental to the purposes of a municipal incorporation, and so not ultra vires (see *A-G v Smethwick* G *Corp*[7]). So also, the employment of a consultant rating surveyor to advise a rating authority on proposals under the Local Government Act 1948 was not ultra vires (see *Grainger v Liverpool Corp*[8]).

In his work on English *Company Law* (23rd Ed) p 116 paras 9–10 Palmer observes that:

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> if a company is formed, for example, to buy, sell and deal in coal, it may, for the purpose of carrying out its objects, do the following things which can be said to be fairly incidental to and consequential on its substantive objects: (1) purchase or take on lease stores; (2) open shops and agencies; (3) buy and hire lorries, trucks, carts, horses; (4) enter into service agreements with employees; (5) draw and accept bills of exchange; (6) borrow and give security; (7) incur debts; (8) I make contracts for purchase of supply; (9) have a banking account; (10) bring actions and take proceedings; (11) compromise actions and disputes (see *Bath's case* (1878) 8 Ch D 334); (12) employ agents; (13) pay bonuses and pensions to employees, for these things are fairly incidental to and consequential on the subject to buy, sell, and deal in coal.

However, the words 'incidental to' are not equivalent to the words 'in connection with' but have a narrower meaning — expressed by Lord Macnaghten in *Amalgamated Society of Railway Servants v Osborne*[9] thus at p 97:

> The learned counsel for the appellants did not, as I understood their argument, venture to contend that the power which they claimed could be derived by reasonable implication from the language of the legislature. They said it was a power 'incidental', 'ancillary' or 'conducive' ... . If these rather lose expressions are meant to cover something beyond what may be found in the language which the legislature has used, all I can say is that, so far as I know, there is no foundation in principle or authority for the proposition involved in their use.

Lord Macnaghten's views were relied on in *Attorney General v Crayford Urban District Council*[5].

It follows that in the application of the doctrine of ultra vires there are then three issues: first, whether what is done is specifically authorized by statute; secondly, whether (if there be no specific authority) one can reasonably imply authority from the language of the statute; and, thirdly, whether an act for which no such direct or implied authority is found is reasonably incidental to the carrying into effect of a statutory purpose (see CA Cross *Principles of Local Government Law* (4th Ed) pp 8–9).

It is with the above principles in mind that I turn to consider the submissions before me upon the ultra vires point.

The Enactment by s 3 empowers the defendants to 'enter into contract ... and may convey or transfer or otherwise dispose of or deal with, any movable or immovable property ... vested in the corporation *upon such terms as the corporation deems fit* but not inconsistent with the terms of this Enactment' (emphasis supplied). By s 14(a) it was the duty of the defendants to provide for the development of housing enterprises. Clearly therefore the defendants had the power to enter into contracts such as the agreement in the preparation of which the plaintiffs had no say.

More particularly, cl 11 and consequently cl 25(b), being usual terms encountered in building contracts of the kind under consideration, were incidental terms to the obligation of the defendants under the agreement to construct and to sell the dwelling house, an activity in which the defendants were not only empowered but were under a duty imposed by the Enactment to engage in.

In this context, I would add that any damages payable by the defendants by way of indemnity pursuant to cl 25(b) of the agreement could properly be paid out of the defendants' 'fund' defined by s 19 of the Enactment as the 'Penang Development Corporation Fund'. This is made plain beyond argument by the provisions of s 20(c) or (j) of the Enactment which read as follows:

> The Fund may be applied in defraying the following charges:
>
> (a) ...
> (b) ...
> (c) all costs, charges and expenses of and incidental to the exercise of the powers of the Corporation under this Enactment;
>
> ...

(j) any other expenditure authorised by the Corporation and properly chargeable to revenue account.

It is true that no evidence had been led in the court below to the effect that the defendants had submitted estimates of expenditure of the kind specified in cl 25(b) of the agreement to the Chief Minister and obtained his authorization under s 21A of the Enactment. But, as correctly pointed out by the learned President, this was an expenditure which was not foreseeable and could not easily be quantified until all claims had been considered and determined. Moreover, s 21A(3) of the Enactment enables the defendants to submit a supplementary estimate in any one year for such claims as have been determined.

I was therefore satisfied that there was no substance on the ultra vires point.

Did Encik Mokhtar have the authority to enter into the agreement on behalf of the defendants?

Having found that the agreement, and in particular cll 11 and 25(b), were not ultra vires the powers conferred upon the defendants by the Enactment, I must next ask myself whether Encik Mokhtar was authorized to enter into the agreement on behalf of the defendants. This requires a consideration of the evidence pertinent to this question.

The only witness called by the defendants was Encik Mokhtar. He testified that at the material time he was director of administration employed by the defendants and, in such capacity, he was in charge of the administration and legal matters.

He further testified that in 1974, it was decided at a board meeting of the defendants, on which he sat, that the defendants should embark on the housing project concerned on its land in Bayan Baru. He pointed out that in 1979, although the state legal adviser had sat on the board he was not an ex officio member of the board.

He went on to say that he had drafted the agreement and that he had done so because it was part of his job 'being one of his scheduled duties' conveyed to him orally by Datuk Chet Singh, the chairman of the housing committee set up by the defendants. He explained that although not legally qualified he had drafted the agreement by stringing together bits and pieces from other agreements and that he had included cl 11 out of his own sense of fairness.

He also said — significantly — that after drafting the agreement he had submitted it to the housing committee which was headed by a board member who was then Professor AJ Ratnam, its other two members being the general manager and an officer of the defendants. The housing committee, which was the final body to decide on the contents of the agreement, had considered the draft and approved it.

Encik Mokhtar then signed the agreement on behalf of the defendants, doubtless because, according to his own evidence, he was empowered to sign it. He did, however, add the somewhat startling qualification that he was not empowered to include cl 11 in the agreement but did not say why.

The learned President commented as regards this, and I agree, that she failed to see why he should be empowered to sign the entire agreement except cl 11.

Be that as it may, I do not consider that this admission by a layman having no knowledge of the law should be read as an unconditional admission binding on the defendants regardless of his mistaken view of the law. If Encik Mokhtar was in error, his error cannot oblige the court to follow his view.

I would add that in any event, the housing committee, the duly constituted delegate of the defendants, had approved the draft of the entire agreement, including cl 11, so that even if Encik Mokhtar had no authority to include cl 11 the subsequent approval of the housing committee before the execution of the agreement puts paid to the point. For emphasis, I would draw attention to the principle that a company or corporation may not adopt or effectively ratify an ultra vires act but can adopt and approve of an act that is merely unauthorized or irregular (see *Clarkson & Anor v Davies & Ors*[10] at p 110).

Going back a little, Encik Mokhtar had also testified that the defendants had by a resolution of its board, presumably under s 10(4) of the Enactment, delegated all its powers relating to the housing project to the housing committee. There was no evidence impugning the validity of that act of delegation which I must take to be valid. Certainly, this was an internal matter as to which only the defendants would have knowledge and a third party such as the plaintiffs who entered into the contract bona fide would have no way of determining whether the defendants' internal regulations had been complied with nor does the law require him to do so (see *Royal British Bank v Turquand*[11]).

Clearly, therefore, there was evidence to support the finding of the learned President that the housing committee was a duly authorized delegate of the defendants in all matters relating to housing and so was empowered to bind the defendants in such matters.

That being so, Encik Mokhtar having obtained the prior approval of the housing committee to the contents of the agreement, I was amply satisfied that he had express authority to enter into the agreement on behalf of the defendants.

Alternatively, upon the evidence, the defendants had permitted Encik Mokhtar in the past to act in the general management and conduct of the defendants' business in the housing field, in particular, he had testified that even as early as 1974 when he was already director of administration, he had prepared sale and purchase agreements on behalf of the defendants (p 43E). The giving of such permission would constitute an act of management by the defendants so as to estop the defendants from denying the authority of Encik Mokhtar as against anyone who had relied upon it (see Diplock LJ in *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd*[12] at p 645). However, as estoppel had not been pleaded by the plaintiffs by way of reply, I disregarded the same.

In any event, the rules on apparent or ostensible authority of an agent should be applied together with the indoor management rule enunciated in *Royal British Bank v Turquand.*[11] As I have already said, a party dealing in

good faith with a company or a statutory corporation like the defendants would not know what the actual authority of their agent is and by reason of the indoor management rule, such a party does not have to find out about that. It is sufficient for his purposes if the agent has apparent authority to do the act in question unless he knows or should know of the agent's lack of authority or if there are circumstances that would put him on enquiry or the basic constitutional documents of a company — in the present case the Enactment — makes it plain that the agent's authority is limited. None of these exceptions apply here.

It follows that even if Encik Mokhtar had no actual authority to bind the defendants by entering into the agreement, in my view, upon the facts, he had ostensible authority to do so. This ground of appeal therefore failed and I now turn to consider the next question.

Was cl 11 inserted in the agreement by mistake, in ignorance of s 2 of the Act, and so was not binding upon the defendants?

It is true that the Act does not apply to the defendants for it provides by s 2(1) that nothing in the Act shall apply to anybody or agency established by statute or the government of any state. That, however, is a far cry from saying that the defendants were prohibited from entering into a form of contract contemplated by the Act. That they were at liberty to enter into such a contract is emphasized by s 2(1)(b) of the Enactment which left the defendants free to choose its own terms. In the event, they so chose.

Encik Mokhtar himself drafted the agreement and the plaintiffs had no hand in it. That, in my view, does not entitle the defendants to say that because Encik Mokhtar was unaware that the Act did not apply to the defendants, cl 11, and therefore by extension cl 25(b), are not binding on the defendants. In all respects, the agreement was precisely the contract the parties had intended to make and so it was binding upon the defendants in every respect. This ground of appeal also failed.

I now turn to consider the last question which arises for decision in this appeal.

The public policy point

It was argued for the defendants that if the agreement was held to be valid, then it was open to them, having regard to the circumstances of the case, to rely upon the provisions of the proviso to cl 11 of the agreement which read 'the vendor shall not be liable for any failure to fulfil any term of this agreement if such fulfilment is delayed by circumstances beyond the control of the vendor'.

Explaining the attitude of the defendants towards their bumiputra contractors, Encik Mokhtar said this:

> In relation to contractors, it was part of our job to create a core of bumiputra contractors and to assist them in the course of the performance of their contract jobs. Generally we had to ensure that they survived.

And further down, at p 42B to E, he explained, inter alia, the reasons for the delay and touched on departmental policy thuswise:

The delay of 427 days was caused by one contractor Bumi Plumbing and Engineering Sdn Bhd. We did replace this contractor after 427 days. We did not replace him before that because we found he had a lot of problems which needed our consideration. He needed help. Contractually we could have sacked him.

It took us a lot of time to build the core of bumiputra sanitary contractors. The policy was from the Federal Government and came either from the National Action Council or/and the Ministry of Public Enterprise, under which the PDC came. If I had wanted to get rid of a bad contractor we do not have to clear with the Public Enterprise Ministry but we had to clear it with the Board and the Pusaka Bumi. We then had to report why we had terminated.

I did not have a free hand in matters of this kind in regard to the defendant.

In considering this branch of the defendants' defence the learned President said this at p 90A to p 91E:

The court could take judicial notice of the new economic policy, following the case of *David Hey v New Kok Aun Realty Sdn Bhd* [1985] 1 MLJ 168 at p 170. Mr Van Buerle conceded that the PDC had to engage bumiputra contractors. In this case Bumi Plumbing and Engineering Sdn Bhd (referred to as Bumi Plumbing for convenience) had contracted with the PDC to complete the plumbing and sanitation works in 30 weeks, but despite being given an extension of 16 months by the PDC, they failed to do so. DW1 said that Bumi Plumbing was beseiged by problems including inclement weather, shortage of supplies and shortage of funds. It was DW1's view that apart from making sure a bumiputra secured the contract, the PDC as an umbrella of bumiputra enterprise could not terminate the contract summarily for any breach of its terms, but had to generally mollycoddle the errant contractor until the PDC was satisfied in effect that there was absolutely no hope of his fulfilling his contractual obligations.

In the same vein, DW1 said that they chose not to enforce their right to impose a penalty of $50 per day for each day's delay. In the words of DW1, 'we were prepared to sacrifice and everybody else had to to chip in in the interest of national policy'. Yet, he conceded that the NEP does not condone breaches of contracts by bumiputra nor does it encourage them to break their contracts. Otherwise there would be no need for penalty clauses in government contracts with bumiputras.

It is public knowledge that one of the NEP's many aims is to create opportunities for bumiputras, but I found nothing to support DW1's perception that the NEP is not satisfied by replacing an unsuitable bumiputra contractor with a competent and suitable one. The facts show that there was another bumiputra contractor engaged to do similar works who fulfilled his contractual obligations and eventually took over and completed the work started by Bumi Plumbing. DW1 also admitted that there were other bumiputra contractors in the country who had the expertise to do the job and he was not confined to bumiputra contractors in the state of Penang.

The learned President concluded — and I agree — that based on the foregoing, even accepting the new economic policy as public policy, the delay was not caused as a result of public policy but rather by a travesty of public policy and, as such, was caused by circumstances well within the control of the defendants.

Before concluding this judgment I feel impelled to quote the well known dictum of Burrough J in *Richardson v Mellish*[13] at p 252: 'I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where

it will carry you.' Some 80 years later AL Smith MR in *Driefontein Consolidated Gold Mines Ltd v Janson*[14] at p 605 considered the dimensions of the beast in these terms: 'This public policy is a high horse to mount and is difficult to ride when you have mounted it.' This last ground of appeal also failed.

In the result, the appeal was dismissed with costs. There was also the usual order that the deposit paid by way of security for costs be paid out to the plaintiffs to account of their costs.

Appeal dismissed.

Reported by PS Ranjan